

COMPLIANCE BOARD OPINION NO. 02-9
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July 1, 2002

Neil M. Ridgely

The Open Meetings Compliance Board has considered your complaint alleging that the County Commissioners of Carroll County violated the Open Meetings Act in connection with executive sessions held April 9, 2002, concerning the administration of the County's Concurrency Management Ordinance, and on April 11, concerning the County's impact fees and water and sewer rates.

For the reasons explained below, we conclude that the County Commissioners were engaged in an executive function during the meetings in question.

I

Complaint and Response

In your letter to the Compliance Board, you indicated that, in your view, the County Commissioners use "executive sessions to mask business which should be held routinely in meetings which are open to the [p]ress and public." Your specific complaint related to an executive session that the County Commissioners conducted on April 9, 2002, which was described by the Commissioners' office as involving the "Administration of Current Concurrency Management Chapter," and a second executive session held April 11, described as "Continued Discussion of Present Impact Fees and Water, Sewer Rates."

In support of your complaint, you referred us to the Commissioners' agenda for the week of February 11, and, in particular, an open meeting that was scheduled for February 14 by the Commissioners with the Comptroller concerning impact fee calculations. You indicate that this meeting "entailed a discussion of charging a different amount for the residential impact fees, thus indicating consideration of an amendment to the current law." You also referred us to subsequent agenda items, announcing open sessions between the Commissioners and select County personnel involving water rate increases imposed by Baltimore City (March 14), concurrency management (March 27), and continued discussions on impact fees and water and sewer rates (April 25). You indicated that:

It is my presumption that any discussion of changes or amendments to existing law and policy are covered by the Open [M]eetings Act. The Concurrency Management Ordinance, Impact Fees and water and sewer rates are all matters of existing County laws. It is obvious from the attached agendas that the discussions did involve amendments to existing law or there would not have been a need for discussion. It is quite obvious from the attached agendas that issues which were originally discussed in open meetings were later discussed in Executive Session, then scheduled to be discussed in open sessions [the week of April 22].

In a timely response on behalf of the County Commissioners, Kimberly A. Millender, Esquire, the Carroll County Attorney, indicated that she reviewed the applicable agenda and interviewed appropriate County staff, and has concluded that all of the executive sessions¹ and closed meetings held the week of April 8 were conducted in accordance with the Open Meetings Act. As part of her response, Ms. Millender provided a brief synopsis of each executive session or closed meeting conducted that week. She described the two specific items that were the focus of your complaint as follows:

- April 9, 2002, 2:00 p.m. - Executive Session (Department of Planning, Bureau of Development Review, and the Department of the County Attorney): presentation to the County Commissioners of an overview of the current procedures used for administering and distributing Concurrency Management Certificates under the current Concurrency Management Ordinance.

¹ Application of the Open Meetings Act does not turn on whether a public body labels a meeting an “executive session” or other designation such as a “work session.” Thus, we interpret the Commissioners’ use of the term “executive session” as indicating that they were engaged in an “executive function,” as defined in §10-502(d) of the State Government Article, Annotated Code of Maryland, and therefore the Open Meetings Act did not apply. *See* §10-503. In a recent opinion involving the County Commissioners of Carroll County, we distinguished between meetings outside the scope of the Act and meetings closed pursuant to the Act’s procedures. *See* Compliance Board Opinion 02-2 (February 25, 2002), slip op. at p. 3 - 4.

- April 11, 2002, 2:00 p.m. - Executive Session (Comptroller): general discussion regarding impact fee calculations for town houses and a review of possible alternative calculation methods for water and sewer rates.

Ms. Millender disputed the assumption in your complaint that, because similar topics were disclosed in roughly contemporaneous open sessions, the discussion during the executive sessions necessarily involved proposed amendments to existing ordinances.

Prior to our consideration of your complaint, our counsel requested that Ms. Millender clarify for us the basis for the Commissioners' view that discussion of "possible alternative calculation methods for water and sewer rates" constituted an executive function and whether a change in calculation methods would require an amendment to a County ordinance. In a supplemental response, Ms. Millender acknowledged that any change in water and sewer rates would need to be handled as a legislative matter. Ms. Millender also provided further background on this matter, explaining that, during open sessions held March 14 and 20 and on April 25, the County Comptroller or Director of Management and Budget discussed water and sewer rates in connection with the preparation of the fiscal year 2003 budget and recommended that the County Commissioners not increase rates for the upcoming fiscal year. This discussion was based, at least in part, on the City of Baltimore's decision to increase the rate that it charges Carroll County for water drawn from Liberty Reservoir and whether that increase was sufficient as to require the County Commissioners to increase rates as well.² On April 25, the County Commissioners voted during an open session not to increase water and sewer rates.

As for the executive session conducted April 11, Ms. Millender explained:

... the Comptroller discussed with the Commissioners the possible future impact that City rate increases may have on water and sewer rates and ultimately the County budget. During this discussion, the Comptroller presented the Commissioners with several alternatives or scenarios based on hypothetical City rate increases and the potential impact that the increases would have on the County budget. I emphasize that the discussion

² It is our understanding that Carroll County's access to Liberty Reservoir is governed by a long-term lease between the County and Baltimore City entered into in 1968, allowing the County to access an average of 2.4 million gallons daily or 90 million gallons over a thirty day period. The lease requires the County to pay Baltimore City quarterly for water from the reservoir, based on rates set by Baltimore City's Board of Estimates.

focused on hypothetical scenarios only because the County has no confirmation whether or not the City will continue to increase water rates in future fiscal years. The presentation ...was intended for informational purposes only to give the Commissioners an overview of the possible impacts that water and sewer rates may have on future budgets. The intended purpose was to aid the Commissioners in budget preparations. As such, I believe the session was executive in nature.

II

Discussion

We note at the outset that all three topics at issue are matters addressed by County ordinances.³ Thus, we agree with your position that a County Commissioner meeting during which any change or amendment was discussed would be covered by the Open Meetings Act. Moreover, we understand how one might infer, based on the sequence of meetings in question, that the County Commissioners inappropriately considered in “executive sessions” matters that would constitute legislative functions under the Open Meetings Act. However, the County Commissioners are correct in asserting that the ultimate question of Open Meetings Act compliance turns not on inference but the actual topics addressed in the executive sessions.⁴

A. Concurrency Certificates / Impact Fee Calculations

The County Commissioners claim that the April 9 meeting constituted a presentation by staff on the procedures used for administering and distributing concurrency management certificates under the current County ordinance. Similarly, the County Commissioners’ response indicates that the April 11 meeting involved a general discussion concerning calculation of impact fees. Assuming that these discussions were for the sole purpose of educating the Commissioners on procedures concerning the current administration of the ordinances, we agree with the

³ See Chapters 102 (Development Impact Fees), 167 (Public Facilities and Concurrency Management), and 179 (Sewer and Water), Code of Public Local Laws and Ordinances of Carroll County (2000).

⁴ Last year, we addressed at length the scope of the executive function exclusion in an opinion considering the meeting practices of the Carroll County Commissioners. See Compliance Board Opinion 01-7 (May 8, 2002). Rather than repeat that discussion, we refer the reader to our earlier opinion.

Commissioners' explanation that they were engaged in an executive function. Therefore, the meetings were not subject to the Open Meetings Act. §10-503.

To be sure, if either meeting included discussions beyond the current procedures and involved even a preliminary discussion of potential changes that would require legislative action, by definition, the meeting could not have involved an executive function. §10-502(d); *see, e.g.*, Compliance Board Opinion 93-6 (May 18, 1993), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 35. However, based on the limited information before us, we have no evidence that the County Commissioners breached the limitations of the executive function in these matters.

B. Calculation of Water and Sewer Rates

The County Commissioners also claim that they were engaged in an executive function on April 11 when they reviewed alternative calculation methods for water and sewer rates. The Commissioners' response acknowledged that any change in rates would require amendment of the applicable ordinance.

There is no question that had the Commissioners elected to amend the applicable rates, the entire deliberative process during which they considered the matter, beginning with placing the matter on their agenda, would have constituted a legislative function under the Open Meetings Act. §10-502(f)(1). The Commissioners' final decision not to increase rates would not have altered the nature of the process. Stated otherwise, a meeting at which staff briefed the Commissioners on the effect of the City's rate increase and presented for the Commissioners' consideration their recommendation not to modify water and sewer rates at the time would have constituted a legislative function under the Act. The topic of a rate change, a legislative function, would have been before the Commissioners, and surely they had discretion to reject staff's recommendation and, based on the information presented, direct that legislation be prepared to alter water and sewer rates. Considering that the meeting in question occurred two weeks before the Commissioners voted to maintain current rates, it was natural to infer that the discussions on April 11 were linked to the April 25 decision to maintain the rates currently in place.

Nevertheless, the Commissioners' supplemental response tells us otherwise. Rather than focusing on the immediate impact of the rate increase imposed by Baltimore City or the legislative issue whether to alter water and sewer rates, we are told that, on April 11, the Comptroller briefed the Commissioners on the potential budgetary impact, as well as potential impact on water and sewer rates, during future out years, based on hypothetical City rate increases. It was strictly an informational briefing, intended to assist the Commissioners in budget preparations, not the beginning of a debate on the pros and cons of amending the rates legislation.

In considering the Commissioners' response, we note that a distinction must be drawn between the Commissioners' preparation of a proposed budget, on the one hand, and consideration of legislation imposing a fee increase in light of the proposed budget, on the other. *See* Compliance Board Opinion 97-7 (May 13, 1997), reprinted in 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 227, 229, discussing *Board of County Commissioners v. Landmark Community Newspapers*, 293 Md. 595, 446 A. 2d 63 (1982). While the former constitutes an executive function, the latter involves a legislative function under the Open Meetings Act, §10-502(f), and thus, by definition, cannot be considered an executive function. §10-502(d).⁵

Despite the fact that water and sewer rates were mentioned at the April 11 closed session, the context appears not to have been related to legislation. Instead, the focus was on the budgetary impact of possible future rate increases that Baltimore City might impose. The briefing by the Comptroller may be viewed as an expenditure forecast, important to the Commissioners as they consider the County's budgetary position for future fiscal years. Because the information presented was based solely on hypothetical increases that the City might impose at some future date and was clearly presented in connection with potential budgetary impacts, we conclude that the Commissioners' meeting qualified as an executive function for purposes of the Act.

III

Conclusion

The Open Meetings Act does not apply to a meeting of the County Commissioners when the Commissioners are engaged in an executive function. The Commissioners were engaged in an executive function during the sessions April 9 and 11 when their staff presented briefings on the manner concurrency management certificates were distributed and impact fees were calculated under existing County ordinances, provided discussion did not devolve into potential alternatives that would require amendments to the applicable ordinances. Similarly, the Commissioners were engaged in an executive function on April 11 when they were briefed on the future budgetary impact of potential increases that Baltimore City might charged for water from Liberty Reservoir, even if the briefing addressed potential impact on water and sewer rates, as long as discussion did not involve the actual consideration of water and sewer rates changes, or proposed changes to the

⁵ Furthermore, had the Commissioners discussed modifying the County's agreement with Baltimore City concerning water charges, that discussion would have constituted a quasi-legislative function under the Act, *see* §10-502(j)(3), and thus could not have been considered an executive function.

agreement between Baltimore City and Carroll County concerning water from the reservoir.

OPEN MEETINGS COMPLIANCE BOARD

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